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No. 72-700

In the Supreme Court of the United States

OCTOBER TERM, 1972

HENRY HERNANDEZ, ET AL., PETITIONERS

v.

VETERANS ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioners were conscientious objectors who were exempted from induction into the armed forces and performed civilian alternative service pursuant to Section 6(j) of the Selective Service Act, 50 U.S.C. App. 456(j), and the governing regulations of the Selective Service System, 32 C.F.R. Part 1660. Upon completion of their alternative service, petitioners sought educational benefits pursuant to the Veterans Readjustment Benefits Act, 38 U.S.C. 1651-1687. The Veterans Administration denied the various claims for benefits since, under the Act, such benefits can only be paid to veterans who have served on "active duty"

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in the armed forces. 38 U.S.C. 1652(a)(1), 101 (2) and (21).

Petitioners thereupon instituted the present actions to compel payment to them of the educational benefits available to veterans. They contended that the Act violates due process in not providing veterans' benefits to them, while providing such benefits to veterans who have served on active duty in the armed forces; and they further argued that the statute "abridges plaintiffs' freedom of religion as guaranteed by the First Amendment." Petitioners sought, *inter alia*, declaratory and injunctive relief, and requested the convening of a three-judge court.

The district court dismissed the action. 339 F. Supp. 913; Pet. App. C. The court held that judicial review of the Veterans Administration determinations of petitioners' eligibility for benefits was explicitly precluded by the "no review" provision in the Veterans Act, 38 U.S.C. 211(a).[1] Alternatively, the court noted that petitioners' various constitutional challenges to the Veterans Readjustment Benefits Act were "insubstantial and without merit" and thus did not warrant

[1] 38 U.S.C. 211(a), as amended, provides:

"(a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

the convening of a three-judge court.[2] The court of appeals affirmed (Pet. App. A).

2. Petitioners contend that the bar to judicial review of Veterans Administration decisions in 38 U.S.C. 211(a) cannot be applied to their cases because they are raising constitutional questions. In *Lynch* v. *United States*, 292 U.S. 571, 582, another case involving veterans' benefits, this Court expressly reaffirmed the principle that Congress can preclude judicial review "whatever the character of the proceeding or the source of the right to be enforced" and that the government's immunity from suit in this area "applies alike to causes of action arising under acts of Congress * * * and to those arising from some violation

[2] The district court rejected petitioners' due process challenge to the Act since the "classification scheme is neither arbitrary or unreasonable" (Pet. App. C, 23). The court observed that soldiers on active duty in the armed forces are subject to greater potential for hazardous duty and far greater limitations on personal freedoms (Pet. App. C, 22-23). In addition, the court viewed the limitation of the educational benefit program to veterans of active duty as a reasonable method by which Congress could encourage enlistments (Pet. App. C, 23).

The court also rejected petitioners' various First Amendment Freedom of Religion arguments. As for their "Free Exercise" contention, it held that "[t]here is no restriction placed on plaintiffs' religious opinions or actions by granting benefits to veterans" (Pet. App. C, 23). The court noted that "in fact the purpose of the conscientious objector exemption [itself] is to allow selective service registrants to follow their religious beliefs where they conflict with the purpose of the military." *Ibid.* The court also rejected petitioners' contention under the "Establishment Clause" that the Act impermissibly supports religions represented by soldiers who have served on active duty. The court found *Gillette* v. *United States*, 401 U.S. 437, dispositive of that contention, since there this Court rejected a virtually identical "Establishment" challenge to the conscientious objector provisions themselves (Pet. App. C, 23-24).

of rights conferred upon the citizen by the Constitution."[3] The courts of appeals have consistently adhered to those principles and thus, like the court below here, sustained application of Section 211(a) even when constitutional claims have been alleged. *E.g., Ross* v. *United States,* 462 F. 2d 618 (C.A. 9), certiorari denied, No. 72–337 (Nov. 6, 1972); *de Rodulfa* v. *United States,* 461 F. 2d 1240 (C.A.D.C.), certiorari denied, October 24, 1972, No. 72–225; *Hoffmaster* v. *Veterans Administration,* 444 F. 2d 192 (C.A. 3); *Milliken* v. *Gleason,* 332 F. 2d 122, 123 (C.A. 1), certiorari denied, 379 U.S. 1002.

3. The dismissal of petitioners' actions was correct for the further reason that their various constitutional challenges to the Veterans Readjustment Benefits Act were insubstantial. The classification of beneficiaries under the Act—as the district court noted—has a reasonable basis and does not infringe petitioners' freedom of religion. Thus, there is neither a violation of the Fifth Amendment's Due Process Clause nor the First Amendment's Free Exercise or Establishment Clauses. Accordingly, denial of the request for a three-judge court was proper, *e.g., Ex parte Poresky,* 290 U.S. 30, 32, and dismissal of the actions was correct. *Lion Manufacturing Corp.* v. *Kennedy,* 330 F. 2d 833, 840–841 (C.A.D.C.), motion for leave to file petition

[3] In *Lynch*, this Court explained further that "[w]hen the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. * * * It may limit the individual to administrative remedies." *Id.* at 582.

for writ of mandamus denied (*sub nom. Lion Manufacturing Corp.* v. *McGuire*), 373 U.S. 920; *Wicks* v. *Southern Pacific Co.*, 231 F. 2d 130 (C.A. 9), certiorari denied, 351 U.S. 946.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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